PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Kitch*, 2021 NSPC 31

Date: 20210602
Docket: 8277386, 8277387, 8277388, 8277389, 8277390
Registry: Halifax

Between:

Her Majesty the Queen

v.

Tracy Kitch and Stephen D'Arcy

DECISION ON *O'CONNOR* APPLICATION

Judge:	The Honourable Judge Elizabeth Buckle
Heard:	November 19, 20, December 3, 2020, March 1, 2021, March 3, 2021 and April 6, 2021 in Halifax, Nova Scotia
Decision	June 2, 2021
Counsel:	Peter Dostal, for the Crown Jacqueline King, for the Applicant Tracy Kitch Christi Hunter, for the Applicant Stephen D'Arcy James MacNeil and Allison Godwin, for the Third Party Record Holder, Office of the Auditor General of Nova Scotia

By the Court:

Introduction

[1] This decision concerns whether records in the possession of the Office of the Auditor General of Nova Scotia (OAG) should be produced to the accused and the Crown in two criminal proceedings. Stephen D'Arcy and Tracy Kitch are charged separately. Their trials will be heard separately by different Judges. However, they each seek production of the same records in the hands of OAG. They have filed a joint application for production of that material and a joint hearing was held (s. 551.7(3) of the *Criminal Code*).

[2] Ms. Kitch is charged with 'fraud over $5,000' and 'fraud in connection with duties of office', contrary to ss. 380 and 122 of the *Criminal Code.* Mr. D'Arcy is charged with 'mischief to data', 'breach of trust by a public officer' and 'unauthorized use of a computer system to commit an offence relating to data', contrary to ss. 430(5), 122, and 342.1(1)(c) of the *Criminal Code*.

[3] During the time period set out in the respective Informations, Ms. Kitch was the Chief Executive Officer (CEO) of the Izaak Walton Killam Hospital for Children (IWK) and Mr. D'Arcy was the Chief Financial Officer (CFO). It is alleged that Ms. Kitch fraudulently paid for personal expenses through the IWK corporate accounts. It is alleged that Mr. D'Arcy deleted and/or instructed employees to delete emails, withheld emails, and acted in contravention of policies and procedures to thwart production of information through the *Freedom of Information and Protection of Privacy* (*FOIPOP*) disclosure process.

[4] In the fall of 2017, the OAG began the process of conducting audits which included the IWK. Around the same time, the police began an investigation into the allegations of improper expensing by Ms. Kitch.

[5] The Applicants seek production of all records, including communication, reports, notes and interviews, in the possession or control of the OAG concerning Ms. Kitch, Mr. D'Arcy, the IWK or the audits relating to those entities, created between January 2017 and June 2020 (the date of filing of the Application).

[6] The process governing production of records in the hands of a third party in this context, commonly referred to as an *O'Connor* Application, is a two stage

process. At the first stage, the judge must decide whether to order production of the Records to the court for review. That can be done if the judge is satisfied that the record is likely relevant to the proceeding against the accused. At the second stage, having reviewed the Records, the judge must determine whether, and to what extent, the Records should be ordered produced to the accused. That decision requires the judge to assess the true relevance of the records and balance the right of the accused to make full answer and defence against other protected interests such as privacy.

[7] The Applicants here argued the documents are likely relevant and their right to make full answer and defence outweighs any privacy or other protected interest in them.

[8] Prior to the hearing, the OAG voluntarily disclosed some of the requested material -- specifically, all correspondence between the police and the OAG, the Crown and the OAG and any internal communication relating to that correspondence. The OAG resisted production of the remaining documents on the basis that likely relevance had not been established and the records are highly private/confidential.

[9] The Crown took no position on the ultimate issue of whether the Records should be produced and identified the central issue as a conflict between the legitimate interests of the OAG in providing confidentiality to people it obtains information from and the legitimate interests of the accused to access records that are potentially relevant.

[10] After the first stage, I advised counsel that I had concluded the records were likely relevant and ordered them produced to me for review.

[11] Having now reviewed them, I have concluded that some parts of some of the Records are relevant and the right of the accused to make full answer and defence outweighs any negative impact of production. As such, redacted copies of some of the Records will be produced to the Applicants and the Crown.

[12] These are my reasons.

Legal Framework

[13] The parties agreed that this application falls under the framework for production outlined in *R. v. O'Connor,* [1995] 4 S.C.R. 411. That two stage process was summarized by the Supreme Court of Canada as follows:

> At the first stage, if satisfied that the record is likely relevant to the proceeding against the accused, the judge may order production of the record for the court's inspection. At the next stage, with the records in hand, the judge determines whether, and to what extent, production should be ordered to the accused.
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> (*R. v. McNeil*, 2009 SCC 3, at para. 27).

[14] At the first stage, the Applicants must establish that the documents are "likely relevant" to the proceedings. That threshold has been discussed by the Supreme Court of Canada in a number of decisions. In *McNeil*, the Court said the "likely relevant" threshold is met where there is:

> … a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify… An "issue at trial" here includes not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also "evidence relating to the credibility of witnesses and the reliability of other evidence in the case.
>
> (*McNeil*, at para. 33, citing with approval *O'Connor*, at para. 22)

[15] In *R. v. Gubbins*, 2018 SCC 44, Rowe, J., writing for the majority, said that it is lower than "true relevance" and "includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence" (para. 27, citing *McNeil*, at para. 44; and, *O'Connor*, at para. 21).

[16] The burden on the Applicant has been described as "significant" but "not onerous" (*Gubbins*, at paras. 26 & 27). It is intended as a mechanism to screen out material that is "clearly irrelevant" (*McNeil*, at para. 27). Its purpose is to allow the courts to act as gatekeepers, preventing "speculative, fanciful, disruptive, unmeritorious, obstructive, and time consuming" requests for production (*Gubbins*, at para. 26, citing *O'Connor*, at para. 24 and *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 32). However, it must be given a "wide and generous" interpretation at this stage (*McNeil*, at para. 44). The Applicants do not have to show the precise manner in which the requested material could be used at trial. In most cases, that would be an impossible burden given the Applicant has never seen the material he/she seeks (*McNeil*, para. 33).

[17] If the Court is satisfied the records are likely relevant, they will be produced to the Court for review.

[18] At the second stage, with the records in hand, the Court must determine the "true" or "actual" relevance of the records and balance this against the potential negative impact of production.

[19] At this stage, relevance continues to require that the information "pertain to an issue in the trial" (*McNeil,* at para. 42). That has to be assessed in the context of the entire case, including the anticipated evidence and legal arguments .

[20] The potential negative impacts of production will vary depending on the case and the balancing required by each case will be unique. This was recognized in *O'Connor*, where the Court provided a non-exhaustive list of factors to assist trial courts. In every case it is important to determine the extent to which the record is necessary for full answer and defence, the probative value of the record and the nature and extent of any reasonable expectation of privacy in the record.

[21] In *McNeil,* the Court explained that determining the nature and extent of any reasonable expectation of privacy requires "a contextual assessment" and referenced factors that should be considered: how the record was created; who created the record; the purpose of the record; the context of the case in which the record would be used; who holds the privacy interest; the presence or absence of waiver; and any applicable legislation (at para. 35).

[22] These records were created or gathered in the course of the OAG's mandate to perform audits under the *Auditor General Act*, SNS 2010, c 33, ("AG Act"). That Act specifically protects information contained in OAG files and generally emphasises the confidentiality of the work done by the OAG. The relevant provisions are as follows:

> 13(1) Notwithstanding any other legislation, neither the Auditor General or previous Auditors General, nor persons who are or were part of the Office or employees of the Office or persons under contract to the Office may be compelled to give testimony relating to any information obtained or derived in the performance of their duties under this Act or any other enactment or authority or to produce any documents containing such information, except as required in the administration of this Act or any proceedings under this Act or under the Criminal Code (Canada).
>
> (2) All information contained in the files, audit records and other records of the Office is exempt from the Freedom of Information and Protection of Privacy Act and disclosure under any other legislation.
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> (6) Audit working papers of the Office must not be tabled in the House of Assembly or be produced to any committee of the House of Assembly.

> 15 (1) The Auditor General shall require every person employed in or engaged for a limited time by the Office, who is to examine the records of any auditable entity under this Act, to comply with any security requirements applicable to persons employed by that auditable entity.
>
> (2) Subject to subsection (3), the Auditor General, the Deputy Auditor General and each other person employed in or engaged for a limited time by the Office shall preserve secrecy with respect to all matters not considered to be of general public knowledge, that come to their knowledge in the course of their duties under this Act, and shall not communicate such matters to any person, except as required in the administration of this Act, the conduct of any joint audits under this Act, or any proceedings under this Act or under the Criminal Code or as required for professional responsibilities and licensing.
>
> (3) Notwithstanding any other provisions of this Act, the Auditor General, the Deputy Auditor General and each other person employed in or engaged for a limited time by the Office shall not disclose any information disclosed to the Office, that is subject to solicitor-client privilege, litigation privilege, settlement privilege or public interest immunity, without the consent of the holder of the privilege or immunity.
>
> (4) The Auditor General, Deputy Auditor General and each other person employed in the Office, before commencing their duties, shall take the following oath:
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> > I, ..., solemnly and sincerely swear that I will faithfully fulfil the duties of my position in the Office of the Auditor General and that I will comply with all confidentiality and other requirements of the Office of the Auditor General as stipulated in the Auditor General Act.
>
> (5) The Office shall not retain personal information obtained under the application of this Act unless the personal information is reasonably necessary for the proper administration of this Act or any proceeding under it.
>
> (6) Subject to subsection (3), nothing in this Section limits the authority of the Auditor General to report in accordance with any other provision of this Act or to comment on such reports or to participate in professional reviews required in order to maintain standing as a professional audit office or to meet national standards with respect to quality assurance of audit and other engagements.

[23] I will discuss other aspects of the privacy analysis when I refer to the evidence.

[24] Given the special mandate of the OAG, the type of information at issue and the fact that the entity involved is a hospital, the balancing also requires that I consider additional factors such as any potential prejudice to the role or proper functioning of the OAG, potential prejudice to the security, including job security,

of the people who provided information to the OAG, and the need to safeguard information that relates to health and the proper functioning of the hospital.

[25] Privacy must generally yield to the right of the accused to make full answer and defence. If, upon inspection, I conclude that a record or some part thereof is relevant, it should be treated as '*Stinchcombe*' disclosure, meaning that with few exceptions the accused's right to access information necessary to make full answer and defence will outweigh any competing privacy interests (*McNeil*, paras. 41 – 43; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326).

[26] Subject to the "innocence at stake" exception, privileged material will not be produced even if it is relevant.

[27] Even if I conclude that a document or some information in a document is relevant and should be produced, steps can be taken to mitigate the negative impacts of production. Documents can be redacted to remove irrelevant information and avoid unnecessary invasion of privacy interests and conditions or restrictions can be placed on the use and dissemination of information (*McNeil*, at paras. 43-44 & 46).

Position of Parties

[28] The Applicants argued that the Records are likely relevant in three areas: the reliability and credibility of Crown witnesses who were interviewed by the OAG during the audit(s); to assess the extent to which the IWK's policies and procedures, which the OAG examined and the Crown will rely on, were known, understood, enforced and adhered to; and, to inform the Court's understanding of the unfolding of events, including the role of the OAG in the decision to report the matter to police.

[29] In response to the specific headings argued by the Applicants, Counsel for the OAG argued that: the mere fact that a Crown witness was interviewed by the OAG does not mean they spoke about matters that relate to the prosecution; the OAG's conclusions about policies and procedures are clearly set out in the Audit Report, which is public; and, the Applicants have not shown how any undisclosed documents would relate to the unfolding of events relating to the criminal prosecution since all correspondence relating to that issue has been disclosed and it is disputed that the OAG improperly influenced the decision to involve the police.

[30] The Crown also disagreed with any assertion by the Applicants that the OAG exerted improper influence over the decision to report the matter to police and highlighted areas it viewed as significant to the Court's analysis, including: the need

to assess likely relevancy for each accused individually in light of the different allegations against them and the different timeframes for those allegations; and, the need to carefully assess materiality in light of the focus of the work of the OAG compared to the subject of the charges.

Overview of Evidence on the Application

[31] The evidence at Stage 1 consisted of: a two volume Application Record filed by the Applicants; Affidavit of Terry Spicer with attachments (Ex.1); Affidavit of Michael Pickup (Ex. 2); and, testimony from Mr. Spicer, Mr. Pickup, Andrew Atherton and Adam Harding. During the relevant time period, each of these witnesses worked with the OAG.

[32] Mr. Pickup was the Auditor General for Nova Scotia (AG) at the relevant time but had since left Nova Scotia. He provided general evidence about normal practice, policy and procedure. He was ultimately responsible for the decision to conduct the audit, signed off on press releases, provided oversight for the Audits and the final Report was released under his signature. However, he could offer very little specific evidence because he did not directly take part in the audit work and did not personally conduct any interviews or document review.

[33] Mr. Spicer was the Deputy Auditor General but had since become the AG. He was also able to provide general evidence about normal practice, policy and procedure. However, he could offer very little specific evidence because he had recused himself from involvement in the IWK audits because of a potential for a perceived conflict of interest.

[34] Mr. Atherton was the Assistant Auditor General for Nova Scotia. He was involved in the planning and oversight of the IWK audit, worked with a team to draft the Report and was responsible for searching his own documents in response to the application for production of documents.

[35] Mr. Harding was an Audit Principal and was responsible for the IWK audit. In that role, he directly supervised and provided guidance to the audit team, conducted interviews himself and reviewed notes of all interviews. He was also tasked with collecting documents in response to the application for production of records.

[36] At Stage 2, the Court was provided with additional information: a USB containing the documents that were ordered produced to the Court for review (Ex. 1

– sealed); police statements for 11 potential Crown witnesses (Ex. 2 & 3 - USB); further documents that were provided by counsel for the OAG in response to an inquiry from the Court - April 19, 2021 and May 5, 2021 (Ex. 4 – USB); and, a list of anticipated Crown witnesses (Ex. 5).

[37] In addition, the redacted documents which I have concluded should be produced to the Applicants and the Crown have been placed on a USB (Ex. 6).

Analysis

Stage 1

[38] As noted above, the Applicants argued "likely relevance" under three broad headings. At the first stage, I concluded that they had met the likely relevance threshold under one of those headings. I was satisfied that there was a reasonable possibility that the Records would contain information about the IWK's policies and procedures and the extent to which they were known, understood, enforced and adhered to within the organization. I was also satisfied that this information would be logically probative to issues at the respective trials of the accused.

[39] In the course of its work, the OAG reviewed a number of the policies and procedures of the IWK and other Health Sector entities. The Crown acknowledged that IWK policies will be at play in both prosecutions and that some of those policies will relate directly to the subject matter of the offences.

[40] However, as the Crown correctly pointed out, each accused faces different charges alleged to have occurred over different time frames. As such, each prosecution will engage different policies and involve evidence that has greater or lesser overlap with the time period examined by the OAG.

[41] Ms. Kitch is alleged to have submitted fraudulent expense claims between August 2014 and June 2017. Mr. D'Arcy's offences are alleged to have occurred between January and June of 2017 in that this is when he is alleged to have deleted or instructed others to delete emails. According to the Crown, the emails at issue were created prior to and including early 2017 and relate to finance matters for the year ending December of 2016. According to the Crown, expenditure policies will be important in the Kitch prosecution and policies related to record retention and privacy will be important in the D'Arcy prosecution. Assessing likely relevance for each accused required me to consider the different focus of their respective

prosecutions, the alleged offence period for each accused, the time period examined by the OAG as well as potential defences.

1. Likelihood that the Records Would Contain Information Relating to Relevant Policies and Procedures

[42] In the fall of 2017, the OAG decided to conduct two performance audits touching on the IWK. These were described in the Affidavit of Mr. Spicer as: a health sector IT Performance Audit; and, an IWK Governance Audit. The IT Performance Audit was to determine whether the NS Health Authority, the IWK and the Departments of Internal Services and Health and Wellness had appropriate IT Governance in place for the health sector. According to Mr. Spicer, that Audit covered the period April 1, 2015 to March 31, 2018. The IWK Governance Audit was to determine whether the IWK's Board of Directors and management were providing effective governance and oversight, including financial management. According to Mr. Spicer, the IWK Governance Audit examination included material from January 1, 2014 to December 31, 2017 to determine whether there were effective controls between April 1, 2017 and March 31, 2018. The Audits were completed in the fall of 2018 and the Auditor General's Report was publicly released in December of 2018 (Ex. 2, Affidavit of Mr. Pickup, para. 7; Ex. 1, Affidavit of Mr. Spicer, paras. 10 -18)).

[43] In the course of the Audit, the OAG interviewed management and staff of the IWK and members of its Board (Report of the Auditor General to the Nova Scotia House of Assembly - Application Record, Volume I, Tab 9 at p. 42). Neither the Respondent nor the Crown dispute that at least some of these people will be Crown witnesses.

[44] In his Affidavit, Mr. Spicer described what each audit consisted of. The IT Performance Audit consisted of "interviewing management and other key personnel and reviewing documentation" (Spicer Affidavit, para. 11). The IWK Governance Audit consisted of "interviews with board members, management and staff of the IWK health centre, reviewing policy, examining processes for governance and financial management related controls, and detailed file review . . . walkthroughs of the financial management internal controls . . . examining relevant processes, plans, reports, and other supporting documentation" (Spicer Affidavit, paras. 14 -16). This was expanded upon and clarified in his testimony and that of Mr. Harding and Mr. Atherton.

[45] Mr. Spicer testified that interviews are a standard part of every performance audit. These interviews are not normally recorded. Typically, the person doing the interview would prepare a list of questions, the interviewer or another member of the audit team would take notes during the interview, that information would be sent back to the interviewee to make sure it captured the essence of their responses and then would be put into a database. Typically, the questions would not be provided to the interviewees in advance but they could be if they were standard questions.

[46] The scope of the audit would dictate who to interview or what other sources of information would be required. Mr. Spicer said that if financial management was within the scope of the audit, the team would look at the organizational chart for the organization being audited and identify the key people responsible.

[47] Neither Ms. Kitch nor Mr. D'Arcy were interviewed during the audits. However, the OAG interviewed management and staff of the IWK and members of its Board (Report of the Auditor General - Application Record, Volume I, Tab 9 at p. 42).

[48] Mr. Spicer also testified that information could be obtained from individuals other than in a formal interview setting such as informal conversations or specific information about process, location of material, etc. I understood from his evidence that there was no express policy on taking notes of these informal interactions but that any information that was relevant to the audit findings and conclusions must be captured and retained in the audit file as evidence to support those findings or conclusions. That would include notes created from formal interviews, information provided informally and key documents.

[49] The audit conducted by the OAG was not a forensic audit, a specific type of audit designed to determine whether there is potential criminal activity. It was a performance audit, designed to examine overall procedures. As such, it looked at procedures and policies relating to expenses, rather than the specific expenses of any one individual. The witnesses acknowledged that concerns about the CEO expenses and oversight of those expenses triggered the OAG's decision to audit the IWK. However, they all testified that it was not intended to and did not specifically examine the expenses of the CEO or determine whether those expenses were legitimate.

[50] This was confirmed by Mr. Pickup whose decision it was to conduct the audit and who provided high-level review and by Mr. Harding and Mr. Atherton who were tasked with planning and carrying out the Audit. Mr. Atherton testified that the OAG

was clear that they were not auditing the CEO's expenses. That type of audit was not their area of expertise and their view was that the CEO expenses were not part of their role. He testified that the audit team met and made a conscious decision to stay away from the concerns about CEO expenses. As a result, the audit plan, the document which laid out where they wanted to go, did not include CEO expenses. He testified their focus was on process.

[51] In their review of process and policy, the audit team did not specifically examine the process or any specific policy for CEO expenses. However, they did look at process and policy for expenses in general, including those applicable to IWK Management. Mr. Atherton acknowledged that, in the absence of a specific policy for CEO expenses, these would have covered the CEO.

[52] This evidence on the scope of the audit was corroborated by documents, including the Performance Audit Booklet and the Report of the AG. The Performance Audit Booklet is a publication of that office designed to provide auditees basic information about the OAG and what to expect during a performance audit (Ex. 1, Affidavit of Mr. Spicer, Ex. B). The Audit Booklet describes the performance audit mandate as "to examine entities, processes and programs for economy, efficiency and effectiveness and for appropriate use of public funds" (p. 5). The performance audit is further described as examining "… programs, processes, activities or the overall performance of an entity.." and says that a performance audit could include the following areas: "governance, economy, efficiency and effectiveness; performance monitoring and reporting; internal control and systems; compliance with policy, legislation or appropriations; stewardship over and appropriate use of public funds and other resources and property; and maintenance of essential records" (p. 7). The Booklet notes that occasionally, the audit causes the OAG to conclude that a more detailed forensic audit is necessary (p. 7). However, Mr. Spicer testified that would not typically be done in-house as the OAG does not have that expertise. If a forensic audit was called for, the OAG would go to an outside firm with that expertise and if the OAG believed there was criminal wrong-doing, it would advise police.

[53] The AG Report (p. 25) specifically states that:

> We did not design or intend our audit to be a forensic audit. The former Chief Executive Officer's travel and other expenses referred by the IWK Health Centre to law enforcement were not part of the scope of our engagement. We looked at the broader IWK Health Centre financial management controls and governance by

> the Board to better understand how the systems and practices at the IWK Health Centre allowed this situation to occur.

[54] The IT audit also did not focus on any one individual. There is no evidence suggesting that it examined whether Mr. D'Arcy deleted information or whether he complied with IT policies and procedures relating to record retention. It appears that prior to the audit there was no knowledge of the matters that form the basis of the charges against Mr. D'Arcy.

[55] While the audits were not concerned with the specific actions of any one individual, the IWK Governance Audit included sampling of specific financial transactions, such as expense claims, and conducting detailed testing of those samples to determine whether they complied with policies (for example, AG Report, at pp. 28-29).

[56] The rules governing retention of information collected during an audit would not require that "all" of any category of information needed to be kept. For example, there was no requirement that all emails be retained. Rather, the requirement was to retain all relevant information, including specifically any evidence that supported a conclusion. That information had to be put in the audit file. All witnesses confirmed that information that was relevant to the audit and specifically information that would be required to support its findings would be put in the audit file and retained. Material that was not relevant to the audit scope would not be retained.

[57] Both the Crown and counsel for the OAG urged me to carefully examine the time periods covered by the audits in light of the different offence periods alleged for the two Applicants. This impacts both my assessment of what material is likely to be in the possession of the OAG and my assessment of probative value.

[58] Ms. Kitch is alleged to have submitted fraudulent expense claims between August 2014 and June 2017. The IWK Governance Audit was undertaken to determine whether there were effective financial controls, including policies and procedures relating to expense claims, during the period April 1, 2017 to March 31, 2018. This means that the OAG was specifically focussed on policies and procedures that were in place at least for the last few months when Ms. Kitch was allegedly submitting fraudulent expense claims. The evidence does not establish whether these same policies and procedures were in place for the entire offence period, but in my view, it is likely they were. The AG in his Report noted that many of the IWK financial policies were outdated and I saw no indication in his report that the financial controls his office reviewed relating to expense claims were recent

(Report, including at p. 26). It is reasonable to conclude that the polices examined and commented upon by the OAG were in place during the offence period. More significant perhaps to my consideration of the time-frames is that the examination undertaken by the OAG included material from January 1, 2014 to December 31, 2017. The AG Report includes specific reference to some of that material. For example, under the heading "payments, including travel expenses, were not in compliance with policies", the Report includes sample expense claims from 2014 that were inappropriately authorized in 2016 (at p. 28 -29). So, it appears that the samples used by the OAG to test the financial controls spanned the offence period for Ms. Kitch. Based on this, it appears likely that the OAG would be in possession of information relating to expense claims submitted during the time Ms. Kitch is alleged to have submitted fraudulent expense claims and financial controls that were in place for at least a portion of that time.

[59] Mr. D'Arcy is alleged to have deleted or instructed others to delete emails between January and June of 2017. However the emails at issue were created prior to and including early 2017 and allegedly relate to finance matters for the year ending December of 2016. The time period covered by the IT Performance Audit was broad and included that time period. It is unlikely that the IWK Governance Audit would have resulted in any information being collected that related directly to the offences Mr. D'Arcy is facing. However, he is alleged to have deleted emails to thwart a *FOIPOP* application seeking information about IWK expenses. As I will discuss in more detail when I address probative value, information relating to expenses and financial oversight of expenses may have indirect relevance in Mr. D'Arcy's trial. The financial aspect of the emails relates to 2016. The examination undertaken by the OAG for the IWK Governance Audit included material from that time period.

[60] Because the audit team was clear that they were not auditing the CEO expenses, it is unlikely that the team sought information relating to Ms. Kitch's specific expenses. Further, there is no evidence that the OAG was aware, at the beginning of the audit, of any concerns or suspicions relating to Mr. D'Arcy and, given the scope and mandate of the audit, it is similarly unlikely that the team sought out information relating to him or his alleged destruction of data. However, the evidence, in my view, does suggest that they received unsolicited information concerning both Ms. Kitch and Mr. D'Arcy.

[61] For example, Mr. Atherton confirmed that while the team selected who it would speak to based on its audit plan, it would speak to anyone who wanted to

provide information. Further, in cross-examination, Mr. Harding agreed that it was fair to say that people were concerned about the CEO expenses and could be wanting to provide information about that. Finally, it is clear from email correspondence between Mr. Atherton and D/Cst. Pluta, the investigating officer responsible for the criminal investigation, that people who spoke to the audit team were providing information about Mr. D'Arcy and Ms. Kitch. When asked by D/Cst. Pluta if they had received any information about Mr. D'Arcy, Mr. Atherton responded that they had heard speculation but no details. When told that Mr. D'Arcy was also under investigation, Mr. Atherton told the investigator that he was not surprised to hear that as the team had heard more about Mr. D'Arcy than the CEO.

[62] It is clear that the OAG was interested in understanding what policies existed, whether they were sufficient, whether they were being followed and whether there was appropriate oversight. The OAG was not specifically interested in policies and procedures that applied to the CEO or CFO so did not seek out information relating to those positions. However, the evidence suggests that at least some of the policies and procedures they reviewed would apply to those positions. In that context, it is reasonable to infer that information was obtained relating to knowledge, understanding, adherence and oversight of policies and procedures that applied to the CEO and CFO.

[63] Counsel for the OAG correctly submitted that the policies themselves and the OAG conclusions and recommendations with respect to those policies are all available to the Applicants. However, he also argues that any further information would essentially be redundant. I disagree. A line or paragraph in a report offering a conclusion and a recommendation is not a substitute for the underlying witness statements or data supporting the conclusions. For example, Recommendation 2.1 in the Report (p.26) states:

> The IWK Health Centre should create and update policies to provide clear expectations to staff. These policies should address fraud, travel and hospitality, internal meeting expenses, staff social events, gifts of appreciation, signing authority, and procurement

[64] Under that Recommendation, the Report lists various areas where the OAG found shortfalls, including that "Payments, including travel expenses, were not in compliance with policies" (Report, p. 28). Examples are provided, including:

> Senior officials at the IWK Health Centre did not demonstrate or promote a culture of compliance with policies or the importance of internal controls….

[65] Under that statement, the Report goes on to provide an example of a travel claim that was submitted outside the applicable IWK Policy.

[66] These statements provide the Defence with important information but, if relevant, would not constitute full disclosure necessary to make full answer and defence.

[67] The evidence was clear that the conclusions and recommendations in the Report were based on interviews, discussions, review of material, testing of processes etc. The evidence was also clear that any information that supported any of the conclusions and recommendations had to be retained in the audit file.

[68] Counsel for the OAG also submitted that the vast majority of documents that could relate to policies and procedures were voluntarily disclosed. Unfortunately, I have not been told what specific documents were disclosed voluntarily. I understand from submissions that one important category, notes of formal interviews, were not disclosed. I have no direct evidence of what the witnesses were asked or what information they provided. However, I can make inferences based on the purpose of the audit and the summaries and conclusions contained in the Report.

[69] In conclusion on this point, the evidence establishes that the OAG reviewed policies and procedures that will be at play during the trials of the two accused. As part of that review, the OAG examined material that relates to a time period that is relevant to the charges before the Court. The OAG also interviewed witnesses, including Board Members of the IWK. In the Report, the OAG reaches conclusions and makes recommendations about how these policies and procedures were interpreted, applied and adhered to. Those conclusions and recommendations were based on evidence which the OAG was required to retain, at least some of which has not been disclosed.

[70] Therefore, I found there was a reasonable possibility that information related to this issue would be in the possession of the OAG.

2. Likely Relevance of this Type of Information to an Issue at the Respective Trials of Mr. D'Arcy and Ms. Kitch

[71] That does not end the matter. The fact that the OAG may possess certain information does not mean that it should be produced to the Applicants. They have to satisfy the Court that it is likely relevant to an issue in their respective trials. As the Crown correctly stated, the relevance analysis has to be individualized for the

two Applicants. Ms. Kitch and Mr. D'Arcy will have separate trials and face different charges, involving different elements and different time frames.

[72] As in any criminal prosecution, proof of the charges against Ms. Kitch and Mr. D'Arcy will require proof of the act that constitutes each of the alleged offences along with proof of the requisite criminal intent. The result is that for both Applicants, knowledge and subjective intent will be relevant at trial.

[73] Ms. Kitch's charges both involve allegations of fraud relating to expenses. In that prosecution, the Crown will have to prove both an act that is dishonest or otherwise fraudulent and that she knew the act was dishonest or otherwise fraudulent (*R. v. Olan*, [1978] 2 S.C.R. 1175; and, *R. v. Zlatic*, [1993] 2 S.C.R. 29).

[74] It is not uncommon in a fraud trial for the Crown to present evidence of how things should be done and contrast that with how things were done by the accused. As the Crown in this case succinctly put it, a presentation of "is vs ought". That makes the norms within an institution relevant. That is not to suggest that "everyone was doing it" would be a valid defence to fraud. However, for example, if a policy required expense claims to be submitted with receipts and within 60 days, evidence that an accused regularly ignored that policy might appear suspicious and support proof of subjective intent for fraud. However, if there was evidence that the policy was not generally known, or was widely ignored and not enforced, that could mean the accused's behaviour was not unusual and so was not suspicious and not a factor that would support proof of intent.

[75] As such, information concerning how the financial policies and processes were understood, applied, adhered to and enforced is likely relevant to Ms. Kitch's subjective intent for fraud.

[76] Mr. D'Arcy's charges relate to allegations that he deleted or instructed others to delete emails to thwart a *FOIPOP* application seeking information about IWK expenses. The likely relevance analysis in his case is more nuanced.

[77] Each of the charges he faces has its own specific requirements, but at the very least, the Crown will have to prove that he willfully deleted and/or instructed others to delete emails and for the offence under s. 342.1(1)(c) that his use of the computer system was fraudulent and without colour of right and with the intent to delete the emails.

[78] Given the nature of the charges, it is not difficult to see that certain IT policies and processes would be relevant in Mr. D'Arcy's trial. However, having reviewed the IT Performance Audit Report and other material provided during the hearing, and listened to the evidence and submissions, it was not apparent to me that the IT Performance Audit examined those policies. As such, I was not satisfied that information obtained by the OAG during that audit was likely relevant to an issue in Mr. D'Arcy's trial. However, I was satisfied that there was a reasonable possibility that the expense policies examined in the IWK Governance Audit would be indirectly at play in the D'Arcy prosecution.

[79] I understand the Crown theory is that Mr. D'Arcy deleted emails to obstruct a *FOIPOP* request concerning IWK expenses. That involves consideration of his purpose and/or motive -- both of which engage consideration of whether he was trying to hide wrong-doing by himself or others. The time frame for my assessment of potential relevance is broader than the time frame in the Information and broader than the time frame of the specific focus of the Audit. The subject matter or content of the data and Mr. D'Arcy's possible motives to delete it will likely be relevant at trial. This renders the circumstances that existed at the time the data was created relevant and broadens the time frame to include at least the timeframe when the data would have been created. As I have stated, the IWK Governance Audit was specifically concerned with determining whether there were effective financial controls between April 1, 2017 and March 31, 2018. However, to do that, they examined material from January 1, 2014 to December 31, 2017. This time frame includes the period during which the emails and their financial subject matter which will be at issue in the D'Arcy prosecution were created.

[80] As a result, I concluded that the Applicants had met the likely relevance threshold to require the material in the possession of the OAG to be produced to me for review.

[81] Those Records were produced on a USB (Ex. 1 at the Stage 2 hearing).

[82] Since these conclusions are sufficient to have the records produced to me for my review, I will only briefly address the Applicants' arguments under the other headings.

[83] First, I was not satisfied that the Applicants had established that the records were likely relevant to the credibility of witnesses. The Applicants submit that the OAG is in possession of interviews of crown witnesses whose credibility and reliability will be challenged. They further submit that the OAG began the audit

with the belief that there had been criminal wrong-doing and that belief may have influenced witnesses.

[84] The Respondent submits that given the purpose of the Audits performed by the OAG, it cannot be inferred that the interviews conducted in the course of those audits would have dealt with subjects material to the prosecution and defence of the criminal charges. The purpose was to determine whether there was appropriate governance of IT systems and whether existing financial governance was effective and appropriate. The Respondent argues that, given that purpose, it is not reasonable to infer that interviewees would have been asked about specific actions of the accused relating to fraud or mischief to data.

[85] I accept that the audit had a different focus than the criminal investigation and that individuals were in all likelihood not asked questions that would have a direct bearing on issues that would be relevant to the criminal trial. As I have said, I was satisfied that there is a reasonable possibility that individuals who will be witnesses at the trials did provide information that may touch on the subject matter of the charges.

[86] However, it is well recognized that the mere fact that a record may contain statements by a witness that touches on the subject matter of the charge will not meet the likely relevance test (see for example, Doherty J.A.'s comments in *R. v. Batte,* 145 C.C.C. (3d) 449 (Ont. C.A.) at paras. 75 – 77). The applicant must point to "case-specific information" which suggests the content of the statements is likely to be probative of a fact in issue or the credibility of a witness (*Batte,* at paras. 75 – 77).

[87] That can be challenging for an Applicant because they don't yet have the statements. So it is important not to set the bar too high at this stage. In some cases the applicant can meet its burden by pointing to material differences between a witness' statement to police and other evidence, such as testimony at a preliminary inquiry, an utterance to a third party or other disclosure.

[88] In this case, at Stage 1 the Court was not provided with any "case-specific information" to suggest that material in the possession of the OAG would be directly relevant to credibility or reliability in the sense of likely to contain information that is inconsistent with disclosure material or records already produced. There is a possibility that the records might contain information that directly impacts credibility, such as an inconsistent statement or a motive to fabricate, however, "possibility" is not the test. The evidence does not suggest there are inconstancies

and it is clearly not sufficient to say that the witnesses spoke about the same things so it is possible that the records contain an inconsistent statement.

[89] Related to credibility, the Applicants also argued essentially that the OAG started the audit with a belief that there had been criminal wrongdoing and that it is possible that this view was imparted to witnesses, potentially impacting their evidence. They argue that support for that can be found in the various comments of the AG in the media and to the Chair of the IWK Board about the need to report matters to the police and in the contact between the OAG and the Director of Public Prosecutions for Nova Scotia. There is no evidence to suggest that even if the AG had a preconceived belief that there had been criminal wrongdoing that this was imparted to his team who actually conducted the audit, that those individuals conveyed that belief to the people they spoke to or that it influenced their view of the circumstances. That may be possible, but again, "possibility" is not the test.

[90] The Applicants also argued that the records are likely relevant to understand the unfolding of events, particularly the role of the OAG in the decision to report the matter to police. In this respect it is important to recognize that all material relating to any OAG involvement with the PPS and/or the police has been disclosed. The Applicants argue that there were improprieties in the relationship between the OAG and, respectively, the IWK, the police and the PPS. Specifically, the Applicants argue that the OAG pressured the IWK to report the matter to police, improperly shared information with police and had suspicious communication with the Director of the Nova Scotia Public Prosecution Service (DPP).

[91] These are issues that may be pursued at trial. However, I was not satisfied that the information relevant to these matters exists and has not already been produced. Various emails have been produced already. Witnesses testified that there were telephone calls and meetings, however no notes were made of those telephone calls or meetings.

Stage 2 – True Relevance & Balancing

[92] At Stage 2, my task was to first assess the true relevance of the records and then go on to balance the accused's right to make full answer and defence against the privacy interests of third parties, considering the factors set out in *O'Connor* and the subsequent cases.

[93] I have reviewed the records that were produced in unredacted form on a USB (Ex. 1). They include: emails; notes of formal interviews; working papers such as spreadsheets summarizing the evidence; the audit plan; and correspondence. During my review, I found references to certain documents that had not been included. Upon inquiry with counsel for the OAG, I was advised that they had been inadvertently missed and were subsequently provided so formed part of my review (Ex. 4 - USB).

[94] At Stage 1, I concluded that the Records were likely relevant to one area. That does not limit my consideration of true relevance at stage 2. At stage 2, having reviewed all the documents, I again considered all arguments put forward by the Applicants as a potential basis for production.

[95] I have concluded that some portions of some of the records are probative of the issue of how policies and procedures relating to expenses were interpreted, applied and enforced. They are necessary for both Applicants to make full answer and defence with respect to the issue of intent. I also concluded that some portions of some of the records are not directly relevant but were necessary to understand other documents or to properly understand the unfolding of events.

[96] Having concluded that some portions of some records were relevant, I went on to balance that against the potential negative impacts of production using the factors and considerations outlined in *O'Connor* and *McNeil*. Those factors have to be modified to a certain extent to address the unique context of this application.

[97] I concluded that the considerations that are relevant to the balancing in this case are:

- the extent to which the record is necessary for the accused to make full answer and defence;
- the probative value of the record in question;
- the nature and extent of the reasonable expectation of privacy vested in that record;
- the potential prejudice/harm that would be occasioned by production of the record in question, including potential prejudice to the role of the OAG, the individuals to whom the information relates and the proper functioning of the hospital.

[98] As the Court said in *McNeil*, assessing privacy requires "a contextual assessment".

[99] The OAG argued that the records of the OAG are protected by statutory confidentiality and the individuals to whom the records relate have a high expectation of privacy. Further, that confidentiality is necessary to the proper functioning of the OAG and production of the information requested would harm both the OAG and the privacy interests of the individuals.

[100] It submitted that the core purpose of the OAG is to be able to truthfully and accurately report on the functioning of important public entities. Without privacy protections and confidentiality, the validity, accuracy and thoroughness of its work would suffer because participants would be significantly less forthcoming. As such, it submitted that the information, including identities of informants, comments by members of the audited entity, internal correspondence of the audited entity and other confidential information, must not be disclosed.

[101] The Applicants acknowledge that the *AG Act* protects confidentiality but argued that those protections are not absolute. In general, they argued that the Act itself allows for an exception for proceedings under the *Criminal Code* (s. 13(1), *AG Act)* and the discretionary protection in the Act can and should give way to their right to make full answer and defence.

[102] The Applicants also argue specifically that in this case, the OAG was not an impartial actor because it initiated the criminal proceeding by forcing the IWK to report the matter to the police and exchanged information with the police during the parallel investigation/audit. Having stepped outside its proper role, it should not now be entitled to seek the protection of its office. In those circumstances, the Applicants argued that the material in its possession cannot be said to be confidential

[103] The Respondent and the Crown disputed that the OAG forced the IWK to report the matter to the police, improperly shared information with police or engaged in any improper discussions with the DPP. The Respondent submitted that the Auditor General is recognized as an independent nonpartisan officer of the Legislature with responsibility to provide the House with independent and objective assessments of the operations of government, the use of public funds and the integrity of financial reports (Ex. 1 – Affidavit of Terry Spicer, Exhibit "B": Public Audit Booklet) and there is no factual support for the argument that the OAG departed from that role in this case.

[104] My contextual assessment of privacy requires me to first consider the unique role of the OAG, including its purpose, mandate and statutory protections, and the rationale for those protections.

[105] A succinct summary of the role of the OAG is contained in the "Performance Audit Booklet", (Ex. 1, Affidavit of Mr. Spicer, Ex. B). The OAG is described in that booklet as, "…an independent nonpartisan officer of the Legislature, appointed by the House of Assembly for a ten-year term. He or she is responsible to the House for providing independent and objective assessments of the operations of government, the use of public funds, and the integrity of financial reports. The Auditor General helps the House to hold the government to account for its use and stewardship of public funds." (p. 5).

[106] Mr. Pickup testified that this independence and objectivity is critical to the mission and mandate of the OAG.

[107] I have concluded that the OAG is a "true third party" in this proceeding. I was not satisfied that any engagement between the OAG and the police/DPP/IWK relating to a criminal investigation undermined the impartiality of the OAG, the statutory protections enjoyed by the office, or its role in this proceeding as a "third party. Again, these issues may be more fully explored during the respective trials of the two accused. My assessment at this stage is based on the limited information that is before me.

[108] The Court in *McNeil* recognized that an "overriding" statutory regime governing the production of the record in question could be an exception to the requirement that relevance take priority over privacy at Stage 2.

[109] The example provided in *McNeil* is the *Mills* regime which governs the production of private records in the context of prosecutions for sexual offences. While the *AG Act* highlights the importance of confidentiality and privacy and protects information collected by the OAG in some contexts, it does not provide blanket protection. It is a provincial statute which specifically excepts proceedings under the *Criminal Code.* In contrast, the *Mills* regime is codified within the *Criminal Code* and was enacted to specifically address production of records in certain types of criminal cases. As such, the statutory protections in the *AG Act* cannot be equated with the *Mills* regime and, in my view do not provide an "overriding" statutory regime.

[110] I accept that the role of the OAG and the legal protections relating to the confidentiality of its work is unique. However, I agree with the Applicants that the statutory confidentiality protection provided to the work of the OAG is not absolute. It is not a privilege. It allows for exceptions, including the explicit exception for

criminal prosecutions. As such, it is important in that it informs my privacy analysis but is not determinative.

[111] In addition to the statutory provisions relating to confidentiality, the Respondent relies on evidence concerning the OAG's practice and procedures relating to confidentiality. Both Mr. Pickup and Mr. Spicer provided evidence that when the OAG takes on a new audit, it advises the organization that is the subject of the audit that the information obtained through the audit process will be kept confidential, that the OAG is not subject to the *FOIPOP* process and that the information is not disclosable to the public (testimony of Michael Pickup; testimony and Ex. 1 - Affidavit of Terry Spicer, para. 18). This information is confirmed in the Performance Audit Booklet which is provided to organizations who are subject to audit (Ex. 1 - Affidavit of Terry Spicer, Exhibit "B", p. 7).

[112] The evidence from these sources was not clear whether the practice of the OAG was to advise individuals of this prior to interviewing them, whether any individuals in the IWK audit were so advised or whether the OAG relied on the organization to provide this information to its employees. If the latter, there was no evidence of whether, in this case, the organization so advised its employees/managers.

[113] In reviewing the documents, I found only one instance where confidentiality or privacy of information was specifically addressed with someone who was interviewed by the OAG. Before I address that instance, I will address the general. The notes of formal interviews all relate to Board Members or Former Board Members. The material I reviewed provided the standard questions that were asked of each person but did not indicate whether there was any introductory script used by the interviewers. The typed notes of these meetings were then sent to each person by email with a request that the person review and confirm accuracy or if changes or additions were requested, to note those changes. These emails did not include assurances of confidentiality. However, the notes themselves contained a watermark saying "Confidential Draft".

[114] In one instance a person who was interviewed responded and asked about confidentiality as follows:

> Hello [A.], attached are some questions and comments to your draft notes. My overriding question is really how some of the situation specific and individual information will be used. I'm assuming that is for internal use and my notes were

> intended to give you a contextual reference to other comments. Can you please confirm this? Many thanks, [vetted]".

[115] The employee of the OAG wrote back, "We will keep your individual comments about specific circumstances confidential. Generally, interview comments are reported as an aggregated result, or are used to help corroborate things we have observed or noted reviewing documents. If you have any further questions or concerns, feel free to contact me at any time."

[116] The others either did not respond or responded without commenting on confidentiality.

[117] I have also considered the level of sensitivity and confidentiality in the information and the potential harm that might be done by production, both to the role of the OAG and the individuals or entities that provided information.

[118] The underlying information at issue in this case generally consists of notes of interviews, emails and documents all in the context of professional, financial dealings. It does not include particularly personal information, certainly not as compared to medical, psychiatric or therapeutic records. There are some instances of personal financial information, but this information is not relevant so would not be produced in any event. Further, some of the people who provided information have already been identified and interviewed by police.

[119] The documents do contain some sensitive material including personal opinions about third parties, background information about people who will not be witnesses, irrelevant information about the workings of the Healthcare entities etc.

[120] I accept that there is a need for the public to have faith that information collected by the OAG will be assiduously protected and there is a risk of harm to the role of the OAG if private information is disclosed.

[121] At this stage, I remind myself of Justice Charron's comments at paragraph 41 of *McNeil:*

> ...if the claim of likely relevance is borne out upon inspection, the accused's right to make full answer and defence will, with few exceptions, tip the balance in favour of allowing the application for production.

[122] I am satisfied that concerns relating to privacy and the potential harms of production can be addressed through vetting and that conditions or restrictions can

be put in place to reduce the impact of my Order on the OAG and the individuals and entities involved.

[123] In conclusion, I am satisfied that a portion of the records are relevant to an issue at trial, that they are necessary for the accused to make full answer and defence and that the salutary effects of disclosure outweigh any deleterious effects of non-disclosure.

[124] So, the application is granted with respect to some portion of some records.

[125] In my review, I found one document that would be covered by solicitor client privilege. It will not be disclosed for that reason but was also not relevant.

[126] I have redacted documents to remove private or irrelevant information. No relevant information was redacted due to privacy. Names of people who are not listed as Crown witnesses were generally removed. If the Applicants feel the information is sufficiently relevant to require the person to be identified, further application can be made to me.

[127] In saving the documents to a USB, I have changed the names of some documents to remove identifying information and, in some instances, to make them more easily recognized.

[128] Conditions have been placed on the production of this material to further protect the privacy of third parties and the integrity of the OAG.

Elizabeth Buckle, JPC